

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Applications of XO Communications, LLC	)	WC Docket No. 16-70
and Verizon Communications Inc. for	)	
Transfer of Control of Licenses and	)	
Authorizations	)	
	)	
Applications of CELLCO Partnership D/B/A	)	ULS File No. 0007162285
Verizon Wireless and Nextlink Wireless,	)	
LLC, a Subsidiary of XO Holdings, for	)	
Consent to a Long-Term <i>De Facto</i> Transfer	)	
Spectrum Leasing Arrangement Involving	)	
Local Multipoint Distribution Service and 39	)	
GHz Spectrum	)	

**REPLY OF DISH NETWORK CORPORATION**

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**REPLY OF DISH NETWORK CORPORATION**

DISH Network Corporation (“DISH”) respectfully replies to the Joint Opposition to Petitions to Deny and Comments (“Opposition”) submitted by Verizon Communications Inc. (“Verizon”) and Nextlink Wireless, LLC (“Nextlink”) in the above-referenced proceeding.<sup>1</sup> The Applicants’ response falls far short of providing evidence sufficient to demonstrate that this proposed lease application and related merger application are in the public interest. Indeed, the Applicants try to shift their failure to make a fulsome competition showing into a failure on the part of the Petitioners.<sup>2</sup> In fact, it is not the Petitioners that “fail to identify any specific

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<sup>1</sup> See Joint Opposition of Verizon and Nextlink Wireless to Petitions to Deny and Comments, ULS File No. 0007162285 (May 13, 2016) (“Opposition”). Verizon, XO Holdings, XO Communications, and Nextlink are collectively referred to as “the Applicants.”

<sup>2</sup> DISH Network Corporation, INCOMPAS, and Public Knowledge are collectively referred to as “the Petitioners.”

markets.”<sup>3</sup> It is the Applicants. DISH has shown that the proposed lease and purchase will have significant anticompetitive effects: acquisition of critical 5G resources as well as removal of a competitor in the mobile backhaul (both wireless and fiber), Internet transit, and enterprise and wholesale markets. This showing remains unrebutted.

Moreover, the Applicants’ position that the *de facto* control transfer of XO’s spectrum (through Nextlink) to Verizon should be analyzed separately from Verizon’s purchase of XO’s other assets suffers from an internal inconsistency and a misreading of Commission case law. The Applicants acknowledge, correctly, that LMDS and 39 GHz spectrum “are not a standalone market.”<sup>4</sup> The Applicants also acknowledge that “the use of these bands for backhaul purposes competes with more pervasive options already available, including fiber.”<sup>5</sup> Yet they then try to argue that their acquisition of the one substitute should be analyzed separately from their acquisition of control over the other. Furthermore, Commission precedent does not mandate, or even suggest, that fiber/wired and wireless transactions between the same parties must be analyzed separately. In fact, the Applicants can find only one case involving transactions between a rural Oklahoma Telephone Company and a small wireless company where this was even done, let alone mandated. All of the other cases cited by the Applicants pertain to separate treatment of transactions involving the same purchaser and different sellers, and even these cases do not mandate such treatment.

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<sup>3</sup> Opposition at 4.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.*

**I. The Applicants Have Not Addressed the Central Failing of Their Applications to Provide Any Information Supporting the Purported Public Interest Benefits**

The Applicants' Opposition is wholly lacking in the underlying information necessary for the Commission to properly evaluate both the lease and the purchase. Much of this information is uniquely within the Applicants' control. Missing information continues to include:

- 1) The purchase agreement for XO Communications;
- 2) The lease between Verizon and Nextlink;
- 3) Meaningful geographic and product market definitions;
- 4) Geographic market-by-market identification of Verizon's and XO's wireless and wireline assets and their overlap; and
- 5) Geographic market-by-market identification of third-party competition in all product markets.

The Applicants instead attempt to shift blame onto other parties for the shortcomings of their Applications.<sup>6</sup>

The burden remains on the Applicants to show that the transactions are in the public interest.<sup>7</sup> In saying the "Petitioners fail to identify any specific markets, let alone address the

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<sup>6</sup> For instance, the Applicants allege that the *Petitioners* "fail to identify any competition or public interest harms" and the *Petitioners* "present no specific facts about the impact of the lease arrangement in *any* affected market." Opposition at 3, 4.

<sup>7</sup> The burden rests squarely on the Applicants to prove that the *de facto* transfer is in the public interest. See 47 C.F.R. § 1.9030; FCC Form 608, Main Form Filing Instructions, at 9 (Jan. 2014), <https://transition.fcc.gov/Forms/Form608/608.pdf> ("The burden is on the parties to determine whether such additional information is necessary under Section 310(d) in light of the circumstances of the particular Lease/Sublease."). The Applicants bear the burden of showing that the proposed transactions will serve "the public interest, convenience, and necessity." 47 U.S.C. § 310(d); see also *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order*, 30 FCC Rcd. 9131, 9134 ¶ 2 (2015). Not only must the Applicants prove that the transaction will not harm competition, but also they must affirmatively prove that it will benefit competition. See, e.g., *Applications of Comcast Corporation, General Electric Co. & NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4248 ¶ 24 (2011); *Application of GTE Corp., Transferor, and Bell*

competitive conditions in any such markets,”<sup>8</sup> the Applicants have it completely backwards. In any event, DISH has in fact identified specific relevant markets—geographic and product—that will be harmed by the proposed transactions.<sup>9</sup>

The silence undermines both the Applicants’ claims of benefits and their claims of lack of harm. On the benefits side, the Applicants have provided no economic analysis or expert testimony to support their unsubstantiated assertions of public interest benefits flowing from the transactions. Instead, the Applicants merely repeat their assertions that Verizon will better serve its customers using the millimeter wave (“mmWave”) frequencies it will control under the lease.<sup>10</sup> As for harm, the Applicants ignore entirely DISH’s Petition when they allege that no Petitioner has identified competition or public interest harms that would result from the lease or presented any specific facts about the impact of the lease in any affected market.<sup>11</sup> The Applicants fail to address many of the harms identified by DISH, including:

- 1) The adverse effects on competition, both horizontal and vertical in several markets;
- 2) The elimination of XO as a competitor in the backhaul and transit markets;
- 3) The elimination of XO as a competitor for wholesale and enterprise customers of wireline- and wireless-based services;

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*Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Authorizations and Application to Transfer Control of a Submarine Landing License, Memorandum Opinion and Order*, 15 FCC Rcd. 14032, 14046-47 ¶ 23 (2000).

<sup>8</sup> Opposition at 4.

<sup>9</sup> See, e.g., DISH Network Corp., Petition to Deny, WC Docket No. 16-70, ULS File No. 0007162285 (May 3, 2016) (“DISH Petition”) (explaining the transactions will have both local and national competitive effects in many product markets including the CMRS, backhaul for CMRS, wireline and point-to-point wireless, Internet transit, and enterprise and wholesale markets).

<sup>10</sup> See Opposition at 2-3.

<sup>11</sup> See *id.* at 3-4.

- 4) The significant vertical effects by allowing Verizon to gain control of inputs needed for provision of CMRS service (backhaul and transit); and
- 5) The lease of important 5G spectrum by Verizon, eliminating potential competition in 5G technologies.

The Commission is left with no foundation on which to base any approval of the Applications.

## **II. The Applicants Are Wrong That the Acquisition of Control Over LMDS Spectrum Raises No Competitive Issues**

The fact that Verizon has no LMDS spectrum today does not dispose of the competitive concerns. The provision of services through LMDS spectrum does not constitute a separate market, as the Applicants themselves concede.<sup>12</sup> The lease arrangement, if approved, will allow licensed mmWave spectrum in a critical frequency range to be controlled almost exclusively by Verizon.

The Commission's previous approval of Nextlink's control over such significant holdings of LMDS and 39 GHz has no bearing on whether it is similarly in the public interest for Verizon to control such holdings, despite the Applicants' assertions otherwise.<sup>13</sup> Among other things, current market conditions have changed significantly even since Nextlink completed its latest acquisition of LMDS spectrum in 2014.<sup>14</sup> Since then, demand for wireless backhaul has grown exponentially.<sup>15</sup>

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<sup>12</sup> Opposition at 6 ("LMDS and 39 GHz spectrum also are not a standalone market.").

<sup>13</sup> See Opposition at 3.

<sup>14</sup> See Opposition at 3 n.5.

<sup>15</sup> See Study: *U.S. Mobile Backhaul Demand to Grow Nearly 10x by 2016*, FierceWireless (Mar. 13, 2012), <http://www.fiercewireless.com/story/study-us-mobile-backhaul-demand-grow-nearly-10x-2016/2012-03-13> ("The demand for mobile backhaul in the U.S. market will increase 9.7 times between 2011 and 2016.").

The fact that the LMDS and 39 GHz frequencies are not included in the spectrum screen similarly has no bearing on whether it is in the public interest for a single entity to control the spectrum that Verizon both already controls and would control upon approval of the lease. It is Verizon's obligation to demonstrate that, and it has failed to do so.

The supposed availability of other "significant swaths of spectrum" should not give Verizon a free pass to control the LMDS band. While Verizon claims that such "swaths" "exist in the 6 GHz, 11 GHz, 18 GHz, and 23 GHz bands for wireless backhaul,"<sup>16</sup> the facts suggest something different. In reality, the microwave point-to-point frequencies in these bands have become scarce in many sections of the country, forcing many carriers, including Sprint, to seek wireless backhaul solutions elsewhere.<sup>17</sup> Verizon claims that its acquisition of LMDS spectrum should not matter because of "more pervasive options," including fiber; yet in these very transactions, it seeks to lock up significant amounts of fiber.

### **III. The Applicants Should Not Be Allowed to Avoid the Commission's Evaluation by Invoking the Spectrum Frontiers Proceeding**

The Spectrum Frontiers rulemaking is not suited for evaluating the competitive effects of these transactions, contrary to the Applicants' claims otherwise.<sup>18</sup> The purpose of the rulemaking is to develop service rules, licensing mechanisms, and technical rules that will promote the flexible spectrum policy goals of the Commission.

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<sup>16</sup> Opposition at 6.

<sup>17</sup> Sprint Corporation, GN Docket No. 14-177, Reply Comments, at 3 (Feb. 26, 2016) ("Microwave point-to-point frequencies in the traditional 6 GHz, 11 GHz, 18 GHz, and 23 GHz bands have become scarce in sections of the country, prompting some, including Sprint, to seek wireless backhaul solutions in other bands.").

<sup>18</sup> See Opposition at 7-8.

Verizon has tried this strategy before, arguing that the effects of its acquisition of ALLTEL on roaming had no place in the Commission’s evaluation of the transaction because they belonged in a pending rulemaking proceeding.<sup>19</sup> As in *ALLTEL*,<sup>20</sup> the Commission should evaluate the effects of the transaction here and now. The same approach is appropriate here—addressing the many transaction-specific harms raised by the proposed lease and purchase in this transaction, rather than in the Spectrum Frontiers proceeding, will prevent the significant harm that the transactions would likely cause.

#### **IV. The Spectrum Lease and the XO Purchase Should be Considered Together**

The Applicants filed their Opposition only in the lease docket, and insist that the spectrum lease should be evaluated wholly separately from the purchase of XO.<sup>21</sup> However, the competitive effects of the two transactions are intertwined, and the Commission should consider them together.<sup>22</sup> The Applicants themselves acknowledge, and indeed emphasize, the substitutability of wireless and fiber backhaul.<sup>23</sup> Verizon cannot credibly argue that a transaction

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<sup>19</sup> See Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, Joint Opposition to Petitions to Deny and Comments, WT Docket No. 08-95, at 42-45 (Aug. 19, 2008).

<sup>20</sup> See *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, Memorandum Opinion and Order and Declaratory Ruling*, WT Docket No. 08-95, File Nos. 0003463892, *et al.*, ITC-T/C-20080613-00270, *et al.* File No. ISP-PDR-20080613-00012, 23 FCC Rcd. 17522-23, 17524-25 ¶¶ 175, 178-79 (2008), *aff’d Order on Reconsideration*, 27 FCC Rcd. 16444, 16450-51 ¶¶ 14-15 (2012).

<sup>21</sup> See Opposition at 10-12.

<sup>22</sup> See DISH Petition at 4-6.

<sup>23</sup> See Opposition at 6 (stating that use of LMDS and 39 GHz spectrum “bands for backhaul purposes competes with more pervasive options already available, including fiber.”).

in which it seeks to acquire control of one should be examined separately from a transaction in which it seeks to acquire the other.

The Applicants maintain that to do otherwise would violate Commission precedent and that the Commission “should not consider multiple acquisitions by the same purchaser in a single proceeding.”<sup>24</sup> However, the precedent cited by the Applicants concerns multiple acquisitions with a single purchaser and *different* sellers.<sup>25</sup> Even for such acquisitions, it is not true that the Commission “should not” consider them separately. The only case found by the Applicants where the Commission evaluated separately two transactions involving the same buyer and seller concerned two very small companies, Oklahoma Western Telephone Company and KCL Enterprises, and is a far cry from the instant transactions.<sup>26</sup> Nor is it necessary for the spectrum lease to be contingent on the XO purchase for the transactions to be evaluated together.<sup>27</sup>

With its key spectrum assets under a long-term *de facto* control lease to Verizon, it is no source of comfort that “Nextlink will continue to operate as an independent entity distinct from

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<sup>24</sup> Opposition at 11.

<sup>25</sup> See *Nextel Commc’ns, Inc. and OneComm Corp., N.A.*, 10 FCC Rcd 3361, 3363-64 ¶¶ 18-20 (WTB 1995) (reviewing separately Nextel’s application to acquire OneComm and OneComm’s affiliate C-Call Corp. and Nextel’s application to acquire licenses from Motorola); *Commc’ns Satellite Corp., et al.*, 2 FCC Rcd 7202, 7205 ¶ 22 (CCB 1987) (reviewing separately Contel ASC’s application to acquire CICI and Contel ASC’s application to acquire Equatorial); *AT&T Inc. and Qualcomm Inc.*, 26 FCC Rcd 17589, 17622 ¶ 80 (2011) (reviewing separately AT&T’s application to acquire licenses from Qualcomm and AT&T’s application for smaller licensing arrangement and transfer applications).

<sup>26</sup> See Opposition at 11 n.39 (citing Domestic Section 214 Application Filed for the Transfer of Control of Oklahoma Western Telephone Company to KCL Enterprises, Inc., Public Notice, 31 FCC Rcd 87 (2016); Form 603 Application for the Transfer of Control of Oklahoma Western Telephone Company to KCL Enterprises, Inc., File No. 0007034991, Public Notice, Report No. 11287 (rel. Apr. 6, 2016) (granting applicants’ domestic Section 214 application separately from granting applicants’ wireless application)).

<sup>27</sup> See DISH Petition at 4 n.19.

Verizon” or “continue to use its spectrum in discrete geographic areas.”<sup>28</sup> If independent, Nextlink will be close to an empty shell. With the exception of three LMDS licenses expiring in September 2016, *all* of Nextlink’s 39 GHz and LMDS spectrum will fall under the proposed lease arrangement.<sup>29</sup> Nextlink will only be left with fixed point-to-point microwave licenses and none of its 5G spectrum.

#### **V. The Applicants’ Standing Argument is Unavailing**

DISH is clearly a party in interest in this proceeding,<sup>30</sup> despite the Applicants’ claims otherwise.<sup>31</sup> Among other things, approval of the transaction would injure DISH in the backhaul and transit markets, two markets in which it purchases services today. By giving Verizon control over XO’s fiber assets and Nextlink’s 39 GHz and LMDS spectrum, the transaction would remove providers of both traditional backhaul and emerging “fronthaul” architectures.

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<sup>28</sup> Opposition at 12.

<sup>29</sup> FCC, Universal Licensing System, Nextlink Local Multipoint Distribution Service Licenses (Lease IDs L000013275, L000013276, and L000013277).

<sup>30</sup> See 47 U.S.C. § 309(d)(1).

<sup>31</sup> See Opposition at 7-8.



## DECLARATION

The foregoing has been prepared using facts of which I have personal knowledge or upon information provided to me. I declare under penalty of perjury that the foregoing, except for those facts for which official notice may be taken, is true and correct to the best of my information, knowledge and belief.

Executed on May 20, 2016

A handwritten signature in black ink, appearing to read 'J. Blum', is written over a light gray rectangular background. Below the signature is a solid black horizontal line.

Jeffrey H. Blum  
Senior Vice President & Deputy General Counsel  
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## CERTIFICATE OF SERVICE

I, Sarah K. Leggin, hereby certify that on May 20, 2016, I caused true and correct copies of the foregoing to be served by electronic mail upon the following counsel:

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Sincerely,



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